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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re the Marriage of WILLIAM R. FRY and LAURIE E. FRY.	H037328 (Santa Clara County Super. Ct. No. FL116319)
WILLIAM R. FRY, Appellant, v. LAURIE E. FRY, Respondent.	

I. INTRODUCTION

In this marital dissolution action, appellant William R. Fry (Randy) challenges the trial court's July 18, 2011 order directing him to pay temporary spousal support arrearages to respondent Laurie E. Fry (Laurie)[1] for the period of 2004 through 2008. Randy contends that the trial court erred in (1) awarding temporary spousal support in an amount that exceeds Laurie's needs; (2) ordering that interest on the award of temporary spousal support run from December 31, 2008; and (3) awarding Laurie sanctions in the

[1] Adopting the practice of the parties and trial court, we will hereafter refer to appellant William R. Fry as "Randy" and respondent Laurie E. Fry as "Laurie," for purposes of clarity and meaning no disrespect. (See, e.g., *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 280, fn. 1 (*Cheriton*).)

amount of $5,000 under Family Code section 271.[2] For the reasons stated below, we conclude that the trial court did not abuse its discretion and therefore we will affirm the order.

II. FACTUAL AND PROCEDURAL BACKGROUND

Randy and Laurie were married in 1985 and had three children.[3] In 2003 the parties separated and Randy filed a petition for dissolution of marriage. A status-only judgment of dissolution was entered in May 2005, followed by a January 2010 judgment of dissolution on reserved issues.

A. *Laurie's Motion for Support*

Laurie filed a motion for guideline child support and spousal support and attorney's fees on December 20, 2004. Only two children were minors at that time. Laurie sought a support award retroactive to the filing date for the petition for dissolution of marriage that was "based upon all aspects of [Randy's] income, including all perquisites of his employment and his separate property . . . ." She also sought "consideration of the disparities in the parties' current lifestyles so that she and the minor children can share [Randy's] standard of living." Laurie filed an amended motion on January 26, 2005, that made the same support request.

B. *Evidentiary Hearing On Support Issues*

On June 14, 2006, Laurie filed a trial brief regarding her request for temporary child and spousal support. She asserted that Randy, the president of the retail chain Fry's

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[2] All statutory references hereafter are to the Family Code unless otherwise indicated.

[3] We take judicial notice of this court's opinion in the prior appeal in this matter, *In re Marriage of Fry* (Dec. 14, 2010, H033828 [nonpub. opn.] (*Fry I*). (Evid. Code, § 452, subd. (d)(1).) Our summary of the factual and procedural background includes some information that we have taken from the prior opinion. This court's opinion in a related appeal, *Hammer v. The Taw LP* (Jan. 23, 2012, H035886 [nonpub. opn.], concerns issues that are not relevant to the present appeal.

Electronics, Inc. (Fry's) and his two brothers "have complete control and the management of vast wealth, as well as of the money they choose to disburse as their income." In addition, according to Laurie, "the Fry brothers have acquired assets, which include but are not limited to, the real estate and buildings from which the Fry's Electronics stores operate, a sheep ranch in New Zealand, a fleet of aircraft that they enjoy for their personal pleasure, an island in the Bahamas, a tract of land in Morgan Hill which they developed as a private golf course with single family homes available for personal or business use, a sports team franchise, a bank in Utah, and a company in the Cayman [I]slands."

In her trial brief, Laurie described herself as a homemaker who lacked both a college education and marketable skills, and who had not worked outside the home since 1985 except as a part-time school aid. During the marriage, she "devoted herself to the rearing of the parties' children" and to maintaining their home. Laurie further asserted that her standard of living had been severely reduced since the parties separated. She claimed that she was unable to provide their children with the lifestyle they had during the marriage and that their father currently enjoyed. She therefore requested temporary child and spousal support based on consideration of Randy's assets as well as his earnings.

A four-day evidentiary hearing on Laurie's motion for temporary child and spousal support was held on June 16, 2006; December 15, 2006; November 9, 2007; and November 30, 2007. In addition to the parties, the witnesses included the parties' accounting experts, Sally White and David Blumenthal, and John Fry, the chief executive officer of Fry's.

After the conclusion of the hearing, the parties submitted written closing arguments and proposed statements of decision. In his closing argument, Randy stated that the parties had agreed that any order for temporary spousal support would be retroactive to June 15, 2004. However, Randy argued that an award of guideline

temporary spousal support was inappropriate because it would exceed Laurie's needs, which the evidence showed could not exceed $25,000 per month. Laurie responded in her closing argument that she should receive a guideline award of temporary spousal support based on imputing reasonable compensation to Randy as the president of Fry's.

On July 3, 2008, the trial court issued a proposed statement of decision, followed by the parties' submission of objections and further briefing. In his further briefing, Randy argued that if the trial court decided that Laurie was entitled to temporary spousal support, the court should calculate the award for 2006 and 2007 on the basis of the parties' 2005 income, because using the parties' income in 2006 and 2007 would result in an award that exceeded the pre-separation marital living standard. He also argued that the distributions that Laurie received as a shareholder in the limited partnership holding Fry's stock, known as "the Taw," should be treated as income for purposes of calculating support.

C. *Statement of Decision*

On December 5, 2008, the trial court issued its 25-page statement of decision and order on temporary child support and spousal support. Only that portion of the statement of decision and order concerning temporary spousal support is at issue in the present appeal.

The trial court made several findings and rulings with respect to temporary spousal support in the statement of decision, as follows: (1) Randy had paid Laurie $12,000 per month in "non-characterized support" from June 15, 2004, to the time of the evidentiary hearing; (2) Laurie had not provided adequate support for her claim that reasonable compensation should be imputed to Randy; (3) Laurie had failed to prove that Randy suppressed his income in order to reduce his support obligations; (4) the court would apply Randy's actual salary and employment income in calculating support; (5) income would be added to Randy's actual salary to account for his personal use of corporate aircraft, based on the computation offered by Randy's accounting expert, David

Blumenthal; (6) Randy was not entitled to an offset for payment of joint taxes in 2004, since that was a reimbursement issue to be decided with other issues reserved for trial; (7) temporary spousal support would not be reduced due to Laurie's use of the marital residence after separation, since that was also a reimbursement issue to be decided with other reserved issues and it would be inappropriate to impute additional income to Laurie for "non-employment-related free housing"; (8) Laurie did not enjoy the standard of living that she had before the parties' separation; (9) Randy's proposed cap of $22,000 per month for temporary child and spousal support was rejected because the cap was based on the family's expenses for the atypical year of 2002 and failed to include all expenses (including housing expenses, annual contributions to a retirement plan, the lease value of a newer automobile for Laurie, country club fees, vacation property rentals, and an adjustment for inflation); (10) temporary spousal support for the years 2004 and 2005 would be based on Randy's salary and distributions from the Taw for those years and calculated under the guidelines; (11) temporary spousal support for the years 2006, 2007, and 2008 would also be based on the guidelines, using the parties' 2005 income distributions from the partnership known as the Taw since the post-separation Taw distributions were much greater than those parties had received during the marriage; and (12) Laurie may use Randy's proposed methodology for considering inflation in computing guideline temporary spousal support.

In its statement of decision and order, the trial court did not specify the amount of temporary spousal support that Randy owed. Instead, the court ordered the parties "to meet and confer within fifteen days of the date of this statement of decision and order to compute the temporary child and spousal support due through December 2008, net of Randy's earlier payments, consistent with this statement of decision and order. In accordance with the evidence and the Court's understanding of the proper tax treatment of spousal support, the amounts of guideline spousal support must be computed on a non-taxable basis through December 31, 2007. The guideline spousal support for 2008 shall

be computed on a taxable basis. Randy is then ordered to make any net payment by December 31, 2008. The parties are also ordered to compute the monthly temporary spousal support that will be due beginning January 1, 2009, consistent with this statement of decision and order."

The statement of decision and order further stated that the parties and their experts had "agreed on the inputs to be used in computing guideline child and spousal support, with the exception of certain issues discussed in this statement of decision. Based on the Court's resolution of those disputed issues, the parties and their experts should therefore agree on the resulting computations. The Court reserves jurisdiction to resolve any remaining disputes over the computed amounts of temporary child and spousal support, consistent with this statement of decision and order. To the extent there is any dispute, payment shall still be made by December 31, 2008 for all support periods, with the support computed based on the common undisputed inputs (in other words, excluding only the incremental impact of the dispute). Of course, the Court also reserves jurisdiction under Family Code section 271 and other appropriate sections to award sanctions for any failure to cooperate in meeting and conferring in accordance with this statement of decision and order." (Fn. omitted.)

D. *Fry I*

On February 3, 2009, Randy filed a notice of appeal from the December 5, 2008 statement of decision and order regarding temporary child and spousal support, which he stated was appealable as a judgment. On March 3, 2010, this court denied the parties' request to file a "Stipulation re facts to be utilized in connection with the appeal." We subsequently dismissed the appeal because the December 5, 2008 statement of decision and order is not an appealable order. (*Fry I*, *supra*, H033828.)

E. *Laurie's First Motion to Quantify Arrearages*

In June 2009, while Randy's appeal in *Fry I* was pending, Laurie filed her first motion to "Quantify Arrearages." She sought an order specifying the amount of

temporary child and spousal support that Randy owed under the December 5, 2008 statement of decision and order, stating that Randy had refused to make the calculation on the ground that his appeal stayed all trial court proceedings.

In her motion, Laurie argued that the trial court sitting in equity had jurisdiction to enter an order quantifying the amounts of temporary child and spousal support owed by Randy under the prior statement of decision and order. She advised the court that she was willing to agree to the calculation of guideline temporary support performed by Randy's accounting expert on either a taxable or nontaxable basis. The exhibits to Laurie's motion included a letter from her accounting expert, Sally White, enclosing the schedules that Randy's expert had prepared to show the amounts (taxable and nontaxable) of guideline temporary child and spousal support that he owed under the December 5, 2008 statement of decision and order. Laurie's attorney, Michael G. Ackerman, submitted a supporting declaration in which he stated, among other things, that it was his "belief that [Randy] refuses to quantify the amount of temporary child and spousal support so as to avoid having to pay any interest on the monetary award during the pendency of the appeal."

In his points and authorities in opposition to the motion to quantify arrearages, Randy argued that the trial court lacked jurisdiction to enter the order requested by Laurie because he had perfected his appeal of the December 5, 2008 statement of decision and order. Responding to the contention that he had filed the appeal to prevent interest from running on the support award, Randy stated, "Absent a reversal on appeal, Randy assumes that interest is in fact running from December 31, 2008. That is why, in compliance with [Code of Civil Procedure section] 917.1, the bond posted was in the amount of 1.5 times the undisputed sum. The extra 50% provided for by statute is intended to cover anticipated interest."

A hearing on the motion to quantify arrearages was held in June 2009. The trial court did not rule on the motion, apparently accepting Randy's contention that the pending appeal deprived the court of jurisdiction.

F. *Laurie's Second Motion to Quantify Arrearages*

In March 2011 Laurie filed a second motion to quantify arrearages owed by Randy for temporary child and spousal support. She asserted that the parties had previously entered into a stipulation regarding the amount of guideline temporary child and spousal support that was to be made the order of the court under the December 5, 2008 statement of decision, which was the amount calculated by Randy's accountants, but Randy now refused to abide by the stipulation. In his supporting declaration, attorney Ackerman stated that Randy's accountants had calculated that he owed $873,186 in temporary child and spousal support arrearages under the December 5, 2008, statement of decision. Ackerman also stated that Randy's attorneys had refused to agree that his accountants' calculations were correct. Laurie requested an order that Randy pay temporary child and spousal support arrearages in the amount of $873,186 plus interest at the rate of 10% per annum running from December 31, 2008, through the date of payment.

Laurie also requested an award of monetary sanctions under section 271 on the ground that Randy had "refused to cooperate in reaching a computation of the agreed amount of temporary child and spousal support," which had forced her to file a second motion to quantify arrearages and thereby incur additional attorney's fees and costs.

In his opposition to the motion to quantify arrearages, Randy stated, "[t]here is no dispute that utilizing the court's methodology as outlined in the December 5, 2008 court order for determining temporary spousal and child support, results in calculations showing that [he] owes [Laurie] $873,186." He requested "that the court enter said sum as its order effective the date of the hearing on this motion. By agreeing that the amount of temporary child and spousal support as calculated in [Laurie's] motion is correct,

[Randy] does not waive his right to argue later that the underlying methodology outlined in the December 5, 2008 order is erroneous."

However, Randy disagreed that interest on the order for temporary child and spousal support should run from December 31, 2008. He argued that interest could not accrue until such time as a money judgment was entered and denied that he had previously stipulated that interest would run from December 31, 2008. Randy also opposed Laurie's request for an award of monetary sanctions under section 271.

In reply, Laurie asserted that Randy's attorney had agreed in open court on June 26, 2009, that interest would run on the order for temporary child and spousal support from December 31, 2008. She urged that Randy be estopped from taking a different position.

G. *Order on Second Motion to Quantify Arrearages*

The trial court entered its order on Laurie's second motion to quantify temporary child and spousal support arrearages on July 18, 2011. In its order, the court stated that the parties had agreed that (1) the amounts due under the December 5, 2008 statement of decision for the period of June 15, 2004, through December 31, 2008, was $571,136 for child support and $812,050 for temporary spousal support; and (2) Randy had made payments totaling $510,000 during that time. The court then ruled that Randy owed "a net payment of $873,186 effective December 31, 2008, to be paid within ninety days of this Order." The order did not allocate a specific amount to either child support or temporary spousal support.

Regarding the issue of when interest should begin to run on the support award, the trial court found that Randy's position was "frivolous" and he was "bound by his attorneys' earlier, multiple representations and stipulations." The court therefore ordered that "[i]nterest will run at the legal rate of 10% from December 31, 2008."

As to Laurie's request for sanctions under section 271, the trial court found that sanctions were appropriate because Laurie's second motion to quantify arrearages had

been necessary due to Randy's attempts to avoid his own attorney's prior stipulations about interest and the support computations of his own accounting experts. Finding that Randy had the ability to pay, the court awarded Laurie $5,000 in section 271 sanctions.

III. DISCUSSION

Randy filed a timely notice of appeal from the July 18, 2011 order on Laurie's second motion to quantify temporary child and spousal support. On appeal, he challenges only that portion of the support order awarding temporary spousal support. "[A]n order for temporary spousal support is in the nature of a final judgment and so is directly appealable. [Citation.]" (*In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 595.)

We understand Randy to generally contend that the trial court's award of guideline temporary spousal support should be reversed because the amount of the award exceeds Laurie's needs during the 2004-2008 period. He also challenges the court's ruling that interest on the award of temporary spousal support should run from December 31, 2008, and the award of $5,000 in sanctions under section 271.

Before addressing Randy's contentions of trial court error, we will provide an overview of temporary spousal support and the applicable standard of review.

A. *Temporary Spousal Support*

An award of temporary spousal support is authorized by section 3600, which provides in part: "During the pendency of any proceeding for dissolution of marriage . . . the court may order (a) the husband or wife to pay any amount that is necessary for the support of the wife or husband . . . ."

"Generally, temporary spousal support may be ordered in 'any amount' based on the party's need and the other party's ability to pay. [Citations.] 'Whereas permanent spousal support "provide[s] financial assistance . . .," temporary spousal support "is utilized to maintain the living conditions and standards of the parties in as close to the status quo position as possible pending trial and the division of their assets and

obligations." [Citations.]' [Citation.] The court is not restricted by any set of statutory guidelines in fixing a temporary spousal support amount. [Citation.]" (*In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1327 (*Wittgrove*).)

Although no explicit statutory standards govern the calculation of temporary spousal support (*Cheriton, supra,* 92 Cal.App.4th at p. 312) former Santa Clara County Superior Court Local Family Rule 3B (now rule 3C) provided the following guidelines during the relevant time period: "Temporary spousal or partner support is generally computed by taking 40% of the net income of the payor, minus 50% of the net income of the payee, adjusted for tax consequences. If there is child support, temporary spousal or partner support is calculated on net income not allocated to child support and/or child-related expenses. The temporary spousal support calculations apply these assumptions."

Additionally, the Appendix to the Santa Clara County Superior Court Local Family Rules includes "Discretionary Policy Statements" (capitalization omitted) that "will apply to temporary and permanent orders, in the Court's discretion." Section A3 provides: "The Court will use the local spousal or partner support formula at temporary spousal or partner support hearings except in the following circumstances: [¶] a. The application would be inequitable; or [¶] b. The demonstrated need for the requested support is below the formula amount. [¶] In the interest of avoiding unnecessary litigation on this issue, the Expense Declaration of the payee will not be viewed as determining or fixing need, but as indicating the level of expenditure under the existing circumstances." Section A(2) provides: "In determining the standard of living during marriage . . ., as provided in current statutory and case law regarding the standard of living, the Court will usually base its findings on the combined gross incomes of the parties at the time of separation."

B. *Standard of Review*

The standard of review that applies to an order for temporary spousal support is abuse of discretion. (*Wittgrove*, *supra*, 120 Cal.App.4th at p. 1327.) "[I]n exercising its

broad discretion, the court may properly consider the 'big picture' concerning the parties' assets and income available for support in light of the marriage standard of living. [Citation.] Subject only to the general 'need' and 'the ability to pay,' the amount of a temporary spousal support award lies within the court's sound discretion, which will only be reversed on appeal on a showing of clear abuse of discretion. [Citation.]" (*Ibid.*)

This court has explained that " '[t]he abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' [Citation.]" (*In re Marriage of Walker* (2012) 203 Cal.App.4th 137, 146.)

The burden is on the appellant to establish an abuse of discretion. (*In re Marriage of Rothrock* (2008) 159 Cal.App.4th 223, 230 (*Rothrock*).) Where the appellant contends that the trial court abused its discretion because the court's findings of fact are not supported by substantial evidence, " ' "[o]ur power begins and ends with a determination as to whether there is *any* substantial evidence to support [the findings]. . . . we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom." [Citations.]' [Citation.]" (*In re Marriage of Schnabel* (1994) 30 Cal.App.4th 747, 752.)

In other words, "the test is *not* the presence or absence of a substantial conflict in the evidence. Rather, it is simply whether there is substantial evidence in favor of the respondent. If this 'substantial' evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment must be upheld. As a general rule, therefore, we will look only at the evidence and reasonable inferences supporting the successful party, and disregard the contrary showing. [Citations.]" (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631 (*Howard*).)

C. *Analysis*

1. Award of Temporary Spousal Support

Randy insists that the trial court erred in calculating temporary spousal support for the period of 2004-2008 under the Santa Clara County Superior Court guidelines because his evidence shows that the award greatly exceeds Laurie's needs, which should be capped at $25,000 per month. According to Randy, "[t]he $22,000 cap was based upon the forensic accounting evidence presented by Randy's expert, Mr. Blumenthal, of the expenses for the entire family of five for the year 2002. [Citation.] The $25,000 cap was a 'rounding up' of that figure." Randy also argues that the trial court erred in rejecting the $25,000 cap since Blumenthal's expert testimony on the pre-separation marital standard of living was unrefuted.

Laurie disagrees. She argues that the trial court did not abuse its discretion in awarding temporary spousal support for the 2004-2008 period based on the Santa Clara County Superior Court guidelines, which the court adjusted downward for the years 2006-2008. She also contends that Randy has waived his challenge to the trial court's factual findings because he violated the rule that a substantial evidence challenge must set forth all of the material evidence on a point, not just the appellant's evidence. Alternatively, Laurie contends that the trial court's rulings are supported by substantial evidence showing that 2002 was not a typical year for the Fry family and the marital standard of living included a number of expenses that Randy's expert failed to consider.

Use of Guidelines

At the outset, we will consider the trial court's use of guidelines to calculate temporary spousal support. Although there are no statutory guidelines governing the calculation of temporary spousal support (*Cheriton, supra,* 92 Cal.App.4th at p. 312), the trial court may properly use "local rules or guidelines that provide 'standardized temporary spousal support schedules' that mark appropriate awards for spousal support based solely on the parties' incomes with adjustments for any child support." (*Wittgrove,*

supra, 120 Cal.App.4th at p. 1327.) "[T]he use of such guidelines has been held to be a valuable tool in an aid to calculating Montemporary support. [Citation.] Further, even where standardized local schedules have exceeded a party's stated living expenses because he or she has cut back or is living frugally, courts have held the use of such guidelines for temporary spousal support proper to maintain the marital lifestyle. [Citation.]" (*Id*. at pp. 1327-1328, fn. omitted.)

Thus, it is well established that "[t]he use of such guidelines 'should be encouraged to help lawyers and litigants predict more accurately what temporary support order would be issued if the case proceeded to a contested hearing. . . ." (*In re Marriage of Winter* (1992) 7 Cal.App.4th 1926, 1933.) Where, however, there are "unusual facts or circumstances," the court may appropriately apply the guidelines "as modified by such facts or circumstances." (*In re Marriage of Burlini* (1983) 143 Cal.App.3d 65, 70 (*Burlini*).)

Accordingly, to the extent that Randy contends the trial court was precluded as a matter of law from using the Santa Clara County Superior Court guidelines to calculate temporary spousal support arrearages, we find no merit in that contention. We therefore turn to Randy's chief contention: that the trial court erred in awarding guideline temporary spousal support because the amount exceeds Laurie's needs as reflected the marital standard of living.

Marital Standard of Living

This court has determined that "the trial court's exercise of its discretion regarding retroactivity of temporary support must be guided by two overriding concerns: the supported spouse's need and the supporting spouse's ability to pay. In short, 'the trial court should tailor its award on the basis of the equitable rights of the parties in light of their economic needs and abilities' during the period for which a retroactive increase is sought. [Citation.]" (*Cheriton, supra,* 92 Cal.App.4th at pp. 312-313.)

The supported spouse's need is the amount needed to to maintain the pre-separation marital standard of living, since the purpose of temporary spousal support is maintain the living conditions and standards of the parties as close to the pre-separation status quo position as possible. (*Wittgrove*, *supra*, 120 Cal.App.4th at p. 1327.) Therefore, "[t]rial courts may properly look to the parties' accustomed marital lifestyle as the main basis for a temporary support order. [Citations.]" (*Ibid.*)

In the present case, the trial court awarded retroactive temporary spousal support for the period of 2004-2008. The July 18, 2011 order provides that Randy owes "a net payment of $873,186" for both child support and temporary spousal support. The order did not allocate a specific net amount to temporary spousal support.

Randy argues, however, that the award of temporary spousal support constitutes a windfall to Laurie because the award greatly exceeds the amount that was needed to maintain the pre-separation marital standard of living. According to Randy, the trial court was required to accept the unrefuted opinion of his accounting expert, Blumenthal, that the amount necessary for Laurie to maintain the marital standard of living was $25,000 per month (rounded up by Randy from $22,000), based on the parties' living expenses for the year 2002.

Randy further argues that the temporary spousal support that Laurie needed to maintain the marital standard of living should be calculated by adding together two amounts—monthly child support and Laurie's monthly income—and subtracting the total from $25,000. Using this method of calculating temporary spousal support, Randy argues that Laurie was entitled to an award of monthly temporary spousal support as follows: In 2004, $965 per month; in 2005, $5,223 to $5,589 per month; and in 2006-2008, none.

The trial court, in its December 5, 2008, statement of decision, declined to base the award of temporary spousal support on Blumenthal's opinion that the marital standard of living should be capped at $25,000 per month, based on the family's expenses for 2002.

The court found that "[t]he calculation only covers a single year, and there was evidence that the family's activities in that year were not necessarily typical of the years before separation. Randy's expert [Blumenthal] conceded that he could have expanded his computation to cover from two to five years, and that he did not know whether the total would materially change."

The trial court also found that the pre-separation marital standard of living included several living expenses that Blumenthal had not considered, including the use of the family residence; an annual contribution to a retirement plan; the lease value of a newer automobile for Laurie; fees to join a country club; and the rental value of vacation properties. The court further found that "the computation for 2002 is not adjusted for inflation for the years of ordered support, from 2004 forward."

Randy disputes the trial court's findings regarding the marital standard of living. He argues that the court improperly used a guideline calculation that assumed that the supported party paid for housing, although Laurie had no mortgage expense. He also argues that contribution to a retirement plan does not constitute a living expense; the cost of a car lease was properly excluded because Laurie had two late-model vehicles; the replacement cost of a country club membership does not constitute a living expense; and Laurie offered no evidence of the rental cost of vacation properties or of "significant inflation between 2002 and 2004."

Laurie contends that it was within the trial court's discretion to reject Blumenthal's computation regarding the marital standard of living, for several reasons: the court could properly treat Laurie's post-separation, rent-free use of the family home as a reimbursement issue; Blumenthal conceded in his testimony that he could have, but did not, include the family's annual contribution to a retirement plan in his computation; Blumenthal also conceded that cars needed to be replaced over time, but he failed to include the cost of vehicle lease or replacement in his computation; although Laurie testified that she used a country club membership during the marriage, Blumenthal did

not include a country club membership in the marital standard of living; and Laurie testified that the parties vacationed at ranches in Texas and Martinez, but Blumenthal did not include the expense of vacation rentals although he had considered vacation rentals in the past in computing the marital standard of living.

As to inflation, Laurie argues that the trial court also acted within its discretion when the court rejected Blumenthal's opinion that the year 2002 could be used to establish the marital standard of living, since Blumenthal admitted in his testimony that he had not made an adjustment for inflation during the years 2002-2007 although an inflation adjustment could have resulted in a higher number.

Abuse of Discretion

We determine that Randy has not met his burden to show that the trial court abused its discretion in rejecting Blumenthal's opinions regarding the marital standard of living and awarding retroactive temporary spousal support under the local guidelines, for two reasons.

First, we are not convinced by Randy's argument that the trial court was required to accept the unrefuted testimony of Blumenthal, his accounting expert, that the amount necessary for Laurie to maintain the marital standard of living was $25,000 per month, based on the parties' living expenses for the year 2002. "[T]he fact the expert's testimony was not contradicted by other expert testimony does not make it conclusive on the trial court or on us. [Citation.]" (*In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, 820.) "[T]he general rule [is] that 'expert testimony, like any other, may be rejected by the trier of fact, so long as the rejection is not arbitrary.' [Citation.] Thus, '[a]s a general rule, "[p]rovided the trier of fact does not act arbitrarily, he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted. [Citations.]" [Citation.] This rule is applied equally to expert witnesses.' [Citation.] The *exceptional* principle requiring a fact finder to accept uncontradicted expert testimony as conclusive applies *only* in professional negligence cases where the standard of care must be

established by expert testimony." (*Howard*, *supra*, 72 Cal.App.4th at p. 632; accord, *People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1568 [same].)

The trial court's rejection of Blumenthal's testimony regarding the marital standard of living was not arbitrary because the court found that 2002 was not a typical year for the Fry family and Blumenthal had failed to consider a number of pre-separation expenses in his computation of the marital standard of living, despite the evidentiary support for those expenses (the annual retirement plan contribution; the need to replace cars; the use of a country club membership; and the use of vacation properties).

Second, the trial court had the discretion to use the local guidelines (Santa Clara County Superior Court Local Family Rule 3B (now rule 3C)) to calculate retroactive temporary spousal support. As we have discussed, the trial court may properly use "local rules or guidelines that provide 'standardized temporary spousal support schedules' that mark appropriate awards for spousal support based solely on the parties' incomes with adjustments for any child support . . . ." (*Wittgrove*, *supra*, 120 Cal.App.4th at p. 1327.) Here, the trial court properly modified the guideline support for the years 2006, 2007, and 2008 by using the parties' 2005 income distributions from the Taw due to the unusual circumstance that the post-separation Taw distributions were much greater than those parties had received during the marriage. (See *Burlini*, *supra*, 143 Cal.App.3d at p. 70.)

In short, we determine that the July 18, 2011 order awarding temporary spousal support to Laurie does not constitute an abuse of discretion because the trial court used the local guidelines to calculate the award " 'on the basis of the equitable rights of the parties in light of their economic needs and abilities' . . . ." (*Cheriton*, *supra*, 92 Cal.App.4th at pp. 312-313.) We find no merit in Randy's contention that the trial court erred because the award of temporary spousal support exceeds Laurie's needs, as computed by his accounting expert, since "[t]he showing on appeal is insufficient if it

presents a state of facts that affords only an opportunity for a difference of opinion. [Citation.]" (*Rothrock, supra*, 159 Cal.App.4th at p. 230.)

2. Section 4322

We understand Randy to argue that the award of temporary spousal support for 2008 violates section 4322, which provides: "In an original or modification proceeding, where there are no children, and a party has or acquires a separate estate, including income from employment, sufficient for the party's proper support, no support shall be ordered or continued against the other party." Randy reiterates his argument that "there was no evidence to establish that Laurie had a need for more than $25,000 per month to support herself at the pre-separation standard of living."

Laurie contends that Randy waived the section 4322 issue by failing to object to the proposed statement of decision on that ground. She also notes that the trial court determined in its statement of decision that it was unclear whether the distributions from the Taw constituted income or a partial liquidation of capital. Further, Laurie asserts that the trial court impliedly found in its statement of decision that "Laurie's estate remained insufficient in 2008 for her proper support . . . ."

Section 4322 appears in division 9, part 3, chapter 2 of the Family Code, which governs awards of permanent spousal support. (See, e.g., *In re Marriage of Terry* (2000) 80 Cal.App.4th 921.) However, even assuming that section 4322 applies to an award of temporary spousal support, as discussed *ante* we have determined that the trial court did not abuse its discretion in rejecting the testimony of Randy's expert that Laurie needed no more than $25,000 per month to maintain the marital standard of living. We therefore find no merit in Randy's contention that the trial court's order violated section 4322.

D. *Interest on the Temporary Spousal Support Award*

Randy contends that the trial court erred in its order that interest on the award of temporary spousal support run from December 31, 2008, because interest on a money judgment accrues only upon the date of entry of judgment, pursuant to Code of Civil

Procedures section 685.020.[4] Randy also denies that he stipulated that interest would run from December 31, 2008, asserting that he agreed only that "interest would commence effective December 31, 2008 if the court's December 5, 2008 order was 'affirmed' . . . . Affirmance of the December 5, 2008 order on appeal was a condition of the stipulation."

Laurie asserts that Randy has misstated the facts. She maintains that when Randy took the position during the pendency of *Fry I* that the trial court lacked jurisdiction to issue an order incorporating the parties' support calculations, his attorney agreed that legal interest would accrue on any temporary support arrearages as of December 31, 2008.

Our evaluation of Randy's contention is governed by the rules pertaining to stipulations. " 'A stipulation is "[a]n agreement between opposing counsel . . . ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action," [citation] and serves "to obviate need for proof or to narrow [the] range of litigable issues" [citation.]' [Citation.]" (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279, overrulled on another point in *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1273.) Where the stipulation consisted of a "a colloquy on the record between the court and two counsel," the standard of review that applies to the trial court's construction of the parties' agreement is substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632-633 (*Winograd*).)

In the July 18, 2011 order, the trial court made the following findings regarding the interest stipulation: "Randy's position is frivolous. The stipulation's condition on the

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[4] Code of Civil Procedure section 685.020 provides: "(a) Except as provided in subdivision (b), interest commences to accrue on a money judgment on the date of entry of the judgment. [¶] (b) Unless the judgment otherwise provides, if a money judgment is payable in installments, interest commences to accrue as to each installment on the date the installment becomes due."

support being affirmed on appeal would obviously be satisfied whenever the support is affirmed on appeal. If the award of support is reversed, interest obviously would not be due. The stipulation was not conditioned on the specific pending appeal [*Fry I*] of the Statement of Decision. In fact, in his June 15, 2009 memorandum opposing Laurie's original motion to quantify arrearages . . . Randy stated: 'Absent a reversal on appeal, Randy assumes that interest is in fact running from December 31, 2008' (emphasis added). Randy agreed to pay interest in direct response to Laurie's concern that the Statement of Decision did not state specific amounts of support, and that Randy was avoiding stipulating to the amounts to avoid interest. [¶] Randy is therefore bound by his attorneys' earlier, multiple representations and stipulations. Moreover, at the oral argument on this motion on April 19, 2011, Randy's attorney agreed that Randy could have, legally, stipulated to pay interest as of December 31, 2008. Interest will run at the legal rate of 10% from December 31, 2008."

Having reviewed the record with respect to the parties' interest stipulation, we find that the trial court's construction of the stipulation is supported by substantial evidence. The December 5, 2008 statement of decision and order directed Randy to pay the net amount of temporary spousal support arrearages that the parties' experts had calculated that he owed under the guidelines by December 31, 2008. In his opposition to Laurie's first motion to quantify arrearages, Randy stated: "Absent a reversal on appeal, Randy assumes that interest is in fact running from December 31, 2008. That is why, in compliance with [Code of Civil Procedure section] 917.1, the bond posted [in *Fry* I] was in the amount of 1.5 times the undisputed sum. The extra 50% provided for by statute is intended to cover anticipated interest." Then, during the June 26, 2009 hearing on the motion, the following colloquy occurred:

"THE COURT: . . . Are you stipulating now that interest on whatever amount is finally determined under the order, if it's affirmed, interest runs from December 31, 2008, at 10 percent?

"[RANDY'S COUNSEL]: Yes, I believe that is correct. And I believe that's what their cases stand for, your Honor.

"THE COURT: So even though there's no stipulated amount you'll agree whatever the amount is later runs from December 31st, 2008?

"[RANDY'S COUNSEL]: Yes, your Honor."

On this record of " 'the objective manifestations of agreement or expressions of intent' of the parties" (*Winograd*, *supra*, 68 Cal.App.4th at p. 636), we determine that substantial evidence supports the trial court's construction of the interest stipulation: Randy agreed that interest on the award of temporary spousal support arrearages would run from December 31, 2008. We therefore find no merit in Randy's contention that the stipulation should be construed differently.

E. *Section 271 Sanctions*

Finally, Randy contends that the trial court abused its discretion in awarding Laurie sanctions of $5,000 under section 271.[5]

Section 271 advances the policy of the law " 'to promote settlement and to encourage cooperation which will reduce the cost of litigation.' " (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 177.) Thus, "[f]amily law litigants who flout that policy by engaging in conduct that increases litigation costs are subject to the

[5] Section 271, subdivision (a) provides: "Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award."

imposition of attorneys' fees and costs as a sanction. [Citations.]" (*Ibid*.; see also *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 827 (*Falcone*).)

The standard of review for an order imposing sanctions under section 271 is abuse of discretion. (*In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1478.) " ' " '[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order.' " ' [Citation.] 'In reviewing such an award, we must indulge all reasonable inferences to uphold the court's order.' [Citation.]" (*Ibid*.)

In the July 18, 2011 order, the trial court stated that sanctions under section 271 were "appropriate, because Randy and his attorneys have frustrated the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. This disputed motion [Laurie's second motion to quantify arrearages] was unnecessary. Laurie sought to specify the amount of temporary child and spousal support by accepting the computations of Randy's expert, and the amounts stated above were included in the stipulation that the parties submitted to the Court of Appeal. . . . Randy's arguments in attempting to avoid his own attorney's multiple stipulations about interest are frivolous."

Randy maintains that the trial court erred because he was not uncooperative and in good faith took the legally correct position that interest could not accrue until a money judgment was entered. Laurie, on the other hand, argues that Randy's conduct in taking a position contrary to his earlier stipulation that interest would run on the temporary spousal support award from December 31, 2008, constituted conduct that frustrated settlement and increased the cost of litigation, and therefore the trial court did not abuse its discretion in awarding sanctions under section 271.

We find that the evidence supports the trial court's findings that Randy refused to agree that his own expert's calculations of guideline temporary support under the December 5, 2008 statement of decision were correct, which necessitated Laurie's second

motion to quantify arrearages. And, as discussed *ante*, the evidence also shows that Randy denied that he had previously stipulated that interest on the award of temporary spousal support would run from December 31, 2008. Since it may be inferred from this evidence that Randy failed to cooperate and engaged in conduct that increased the cost of litigation (*Falcone, supra,* 164 Cal.App.4th at p. 827), we conclude that the trial court did not abuse its discretion in awarding sanctions of $5,000 under section 271.

IV. DISPOSITION

The July 18, 2011 order is affirmed. Costs on appeal are awarded to respondent Laurie E. Fry.

_____
BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MÁRQUEZ, J.